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Unraveling the Mysteries of Code Writing

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Land development regulations are everyday tools of the trade for planning commissioners. These regulations are the basis for community decisions about development, growth, and change. They have a wide-ranging audience, including staff, engineers, architects, and attorneys, and they are subject to regular discussion and debate. Your copy of the local regulations may be dog-eared, highlighted, flagged, and "annotated. Yet for all of this attention land development regulations can be ignored and abused. Changing the regulations can be perceived as an unpleasant process, and regulations can be bent and interpreted to a point of losing meaning. Conversely, they can be subject to piece-meal amendment and revision that leaves them functionally useless. This article will explore the important process of developing regulations and provide an approach to keeping regulations up-to-date and truly useful.

Defining Development Code

Speaking technically, the primary and most important role of a development code is its use as a legal document that fully describes the regulatory authority of a municipal body, which is the city, county, town, or agency. The municipal body is enabled by that state's statutory authority, in other words, the amount of authority the state gives a subordinate government to regulate land use. In practice, the development code is the collection of rules, requirements, restrictions, conditions, criteria, and processes that frame land development.

Development regulations come in two basic formats: the classic zoning ordinance and subdivision regulations as separate documents; or the land management ordinance. The latter may be available as LMO, UDO, LMR and a variety of other acronyms and is a combination of zoning and subdivision regulations in a unified document. There is a newcomer in this category called form-based zoning. Form-based zoning is closely identified with the New Urbanism movement and mixes architectural themes and three-dimensional urban design into more traditional zoning concepts.

Some communities have other types of land development regulations. These include:

- design guidelines
- adequate public facilities ordinances
- growth management ordinances

Plus there are a host of smaller items, such as:

- view requirements
- steep slope and hillside regulations
- tree preservation guidelines

Fees and Funding. There are also a related category of land development fee and funding regulations, which do not directly regulate property but are triggered by land development decisions. These include:

- impact fees
- exactions
- transfer of development rights,
- redevelopment programs, i.e. tax increment financing
- some taxes, i.e. excise taxes

The terminology may vary by geographic location and your community may use terms such as ordinance, bylaws, code regulations, or guidelines. The important point is they play a similar role, which is to provide a set of rules and policies to regulate the development of land.

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Plan Implementation

The second role of the land development regulations is to implement the comprehensive plan. Implementation in this context is planning jargon for some action taken to make the plans goals and policies move forward. Many plans have a section or element dedicated to implementation that lists the various actions to be taken. Here is one example of regulatory implementation-incorporating plan design recommendations into regulatory requirements such as design guidelines. Another example is including plan land use policies in regulatory decision-making criteria. Yet a third example is making reference to the plan in the purpose statement of the zoning districts. The role of the plan as it relates to the regulations is twofold. First it provides a framework for the regulatory process so that the regulations can address all of the issues necessary to guide development. Second, it provides detailed information about preferred future development so that regulatory decisions can be made in keeping with the plan.

If the plan is so important, it should correspond well to the regulations. But that depends on your location. In some states, regulatory consistency with the comprehensive plan is mandatory, i.e., the plan and regulations should work together and mirror each other. In some states, the plan and the regulations should be "in accordance with" each other. This leaves room for interpretation, and typically judicial opinions in each state define the level of closeness required by the phrase "in accordance with." Further, in some states, there is either no requirement or whatever minimal requirement exists in state statutes has been interpreted so as to effectively eliminate a relationship between the plan and the regulations.

Regulatory Update

Without naming names, some local governments have land development regulations do not serve their basic planning and regulatory requirements. Fortunately, many communities recognize the problem. Whether provoked by a desire to clean house, changing development patterns, staff revolt, or a lawsuit, many appointed and elected officials decide each year to update their development regulations. Once a commitment has been made to bring regulations up-to-date, this work typically follows a five step process:

> Step One: Defining the process
> Step Two: Establishing public participation
> Step Three: Diagnosing or analyzing the existing regulations
> Step Four: Outlining the new code
> Step Five: Drafting the updated regulations

Defining the Process

The first step in the regulatory update process is defining the process. There are several critical questions you need to ask at the onset. Is it time to throw the whole code out and start over? Or, will it only be necessary to refine key provisions? How long is this job expected to take? What will the community do if it runs into unforeseen issues that prolong the process? Will staff undertake the rewrite? Or, should a consultant be hired? Defining the process is the job of setting expectations to ensure that all of the participants are working toward the same result in the same manner.

Establishing Public Participation

Public participation is necessary for an effective update of land development regulations. The question is how much public participation is necessary given the way the community works and the overall scope of the project. In a case where the regulatory update will be small or targeted to a specific problem, such as adding provisions for conservation subdivisions to an area that previously only had conventional subdivisions, it may only be necessary to meet with residents of relatively undeveloped areas and representatives of the development community. Conversely, where new zone districts are being developed and development standards are being substantially rewritten, it may be necessary to engage in a much larger public participation process. Public participation may include any or all of these approaches:

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- open meetings or workshops
- interviews
- surveys, either written or visual or both
- open periods of public comment
- design charrettes

A design charrette is typically a session or group of sessions where public interaction is facilitated by a planner or architect to explore a series of design concepts applicable to an identified issue with the purpose of creating a preferred design solution. Charrettes can be a useful part of the code revision process, but given their limited focus on design, they should not be the entire basis of the revision process.

In addition to these outreach forms of public participation, the local government may want to create a steering committee to guide the policy aspects of the process, and a technical committee to provide specific feedback on the process.

Diagnosing or Analyzing Existing Regulations

A critical step of the regulatory update process is determining — with some specificity — the problems of the existing regulations. This is because problems with regulations are not always a function of the way a certain provision is drafted. In addition to drafting changes, a regulatory diagnosis should take into account the following four issues.

First, ask the question: Are the provisions working toward a common result or do they conflict with each other? Second, examine how issues outside of the regulatory process, such as state control or engineering requirements, impact development outcomes. Next, examine how the overall tone of the regulations influences decisions. Determine whether the requirements are inflexible and assess whether they discourage negotiation. Or, are they too flexible to provide a starting point for development design? Finally, determine whether, in the big picture, the regulations meet the needs of the plan; in other words, if the plan calls for strong neighborhoods, do the regulations reinforce this?

The code diagnosis should also explore the local government's options for changes to the regulations. It should, at a conceptual level, identify both policy and regulatory choices that will need to be made prior to drafting new regulations. In many instances, a particular issue can be resolved in a number of ways, one of which may be best-suited to your approach. For example, the community may want to encourage mixed-use development to occur at a certain location. One community may be happiest with the creation of a simple mixed-use district and then wait and see what happens. A different community may need to agree on a definition of mixed-use. In this article *simple mixed-use district* is defined as one building divided vertically or multiple buildings with single uses. Community officials will need to determine what incentives will be necessary to encourage mixed-use. For example, officials should consider shared parking, streamlined permitting, and site plan with waivers instead of variance procedure. Next, they need to establish design requirements for potential projects, to include such factors as height regulations, setbacks, and architectural requirements. These are issues that should be identified at a conceptual or big picture level so that the local government can reach agreement about the approach prior to moving to the detailed level of drafting regulations.

In addition, the contents of the regulations are guided by five things. First is the scope of state authority found primarily in state statutes followed next by local government home-rule. Thirdly, regulations are also guided by state and federal case law, and finally and ultimately by the local government's approach to, and comfort level with the regulatory process. The diagnosis provides an opportunity to ensure that potential solutions fit within the local legal requirements. While many states started with similar enabling legislation founded in the State Zoning Enabling Act of the early 1930s, changes over time have resulted in widely varying statutory requirements. A similar range of restrictions exists in the law, so that things you can do in California are not always things you can do in Virginia. Working within the confines of authority, though, many jurisdictions have found ways to reach desired and similar results through a variety of regulatory approaches.

Outlining the New Regulations

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Following the diagnosis and identification of community-preferred ways to regulate, it is helpful to prepare an outline or table of contents of the updated regulations. This will show how all of the provisions will fit together. A sample table of contents would include:

General Provisions

Administrative and Review Procedures

Zone Districts and District Regulations Use Regulations

General Development and Design Standards

Subdivision and Public Improvement Standards

Nonconformities

Enforcement and Penalties

Definitions

Appendices

This potential table of contents can vary, depending upon the factors stated above. In addition to regulations, a community may have administrative guide books, including more detailed information about standards and processes, public distribution information that educates about the regulatory process, and information at varying levels of detail on the local website. Most of these should be considered in the creation of the outline.

Drafting

This term sounds much simpler than it actually is. Drafting is an ongoing process, usually taking three to six or even more iterations to achieve regulations that meet the requirements of the various reviewers. Code updates can be drafted in chapters, segments, or issues. Many times there is a "rolling" review process where each segment is reviewed as it is drafted and then the whole document is reviewed again upon completion. The drafting process may vary by community and it will be the responsibility of the steering committee or project manager to keep this process moving forward.

Drafting of modern regulations will include the provision of charts, graphics, and illustrations. There is ho generally recognized prohibition on pictures in regulations, and it has probably been a function of the fact that regulations were historically drafted by attorneys and it has not been until recently that graphics have started showing-up in regulations. Indeed, some recent judicial opinions have recognized the helpful nature of pictures and illustrations to interpret regulations. Other tips for draft regulations include:

- use of standard language (another legal throw-back)
- ensure consistency everywhere
- if possible in your community, structure the regulations to be used electronically

Adoption

Once the drafting process is completed, the regulations will be subject to adoption by the standards established in state statute. If all goes well, this will not be the time residents decide to start a movement to overthrow the regulations — one of the many reasons why public participation is so important to the process. Adoption, however, is not the end of the process. The staff, planning commissioners, and elected officials will need training to use of the new regulations. And it may be advisable to run some test projects through the process to see how they work. Further, it is necessary then to remember that the regulations are a dynamic document that may and should be subject to continual review and update where necessary. After all, you got to the point of overhaul in the first place! Some approaches that were selected through the diagnosis process may not work as well in real life as they did on paper. This issue will show up in the first few years of the regulation's life. These will need to be changed or tweaked, and

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while the community is at it, some new design style may have come into favor and now those will need to be reflected in the codes ... And so it goes.

Finished

As we noted in the previous paragraph, this word is a misnomer. But there will be a day when the update process is complete and you can spend more time using the regulations than writing the regulations. This is usually about 18 to 24 months after you have started, depending upon the requirements of the update. At this time, you will have a code that provides a broad scope of authority, specifies appropriate processes and standards, and implements the comprehensive plan. Then at that point — it will be time to update the plan.

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